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IN THE

Supreme Court of the United States

No. 77-1592

BOBBY C. CAMBRON, et al, APPELLANT

V.

CANAL INSURANCE CO., APPELLEE

APPEAL FROM THE SUPREME COURT of GEORGIA

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

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Appellants submit herewith their jurisdictional statement as required by Rule 13 of the Rules of The Supreme Court of the United States.

STATEMENT AS TO JURISDICTION

OPINION BELOW

The official report of the opinion delivered by the Georgia Supreme Court appealed from in this case is contained in Volume 240, Georgia Supreme Court, page 708, and a copy of the opinion is appended hereto at appendix page 1.

GROUNDS OF JURISDICTION

This civil complaint in which the Supreme Court of Georgia denied a Motion for a rehearing to review its previous judgment was one claiming fraud filed in the Georgia State Superior Court by Canal Insurance Company to set aside judgments which had been obtained by appellant Cambron in another Georgia court.

It was filed after the U. S. District Court had entered a summary judgment in favor of Cambron and against Canal which held Canal liable to Cambron on the judgments now sought to be set aside, but

which judgment was stayed by the U. S. District Court upon Motion by Canal for the purpose of allowing Canal to attempt to avoid enforcement of the Federal Court judgment by proving fraud as a basis for setting the state court judgments aside.

In the Federal District Court action, Canal had contended that the judgments there sued on were void and that they were also voidable for fraud.

Canal had filed a Motion for Summary Judgment in the Federal District Court case claiming the judgments to be void, and had filed in support of the Motion for Summary Judgment a purported transcript of the evidence and proceedings in the State trial court.

Cambron also filed a Motion for Summary Judgment in the Federal District Court and on the 14th day of February, 1977, Honorable Albert Henderson, U. S. District Judge, granted Cambron's Motion and denied Canal's Motion for Summary Judgment.

Thereupon, Canal filed its Motions in the District Court to alter and amend said Judgment and Judge Henderson refused to alter or amend his decision of February 14th, 1977, but said (appendix 55) "Cambron vs. Canal Insurance Company, # C-74-58-R (hereinafter referred to as "Cambron") was a suit by the administrator of the estate of the deceased insured, James Henry Glover, seeking to hold the insurance company liable for the full amount of judgments returned against its insured for its negligence in failing to defend the tort action against its insured.

Cambron was brought in State Court and removed to this Court by Canal. In a consolidated order dated February 14, 1977, it was held that the insurance policy was in full force and effect on the date of the collision giving rise to these suits. Judgment was entered in Cavalier and the proceeds of the interpleader fund ordered paid to the administrator of the insured's estate subject

to the claims of others. partial summary judgment was granted in Cambron, reserving for trial the issues of excess liability and penalties.

The collision occured on July 2, 1973 and suits against the deceased insured were brought on July 23, 1973 in the Superior Court of Polk County, Georgia.* Canal investigated the accident and filed defensive pleadings without requesting or executing a reservation of rights, but withdrew from the defense on November 1, 1973, three days after the death of the insured, contending that it had cancelled the policy prior to the collision and was therefore under no duty to defend. Default judgments were entered in the two negligence cases for $100,000.00 and $250,000.00.

Canal now claims that these State Court judgments were obtained through fraud, collusion or bad faith, and that this is an issue in both of the consolidated cases which should be determined by the Court.

* Actually brought in the State Court of Polk County

Thus, the insuror argues that judgment should not have been entered on the cross-claim in Cavalier but that the claimant should have been required to interplead any claims to the fund, and that the issues of fraud and bad faith should be reserved for trial in Cambron. Prior to the Order of February 14th, Canal filed an action in the Superior Court of Polk County, Georgia, to set aside the judgments under Georgia Code Annotated 81A-160, and requested that the suit be stayed until final judgment in the Federal suits.

The claimants to the insurance fund in Cavalier were the insured and his two judgment creditors, whose claims have been liquidated by the State Court actions. As noted in footnote 4 of the February 14th order, these claims do not technically expose Canal to a threat of double or multiple liability but interpleader was justified at the time to

protect the company against the vexation of multiple law suits.

This Court also had ancillary jurisdiction over the cross-claim. See order of July 30, 1976.

It now appears that the cross-claim was not, in fact, a correct interpleader action in which the injured parties were required to litigate their claims to the fund, but jurisdiction was proper as ancillary and as a diversity action on the insurance contract. The statute of limitations has run on any claims arising out of the accident and Canal is no longer threatened with the vexation of multiple lawsuits. Georgia Code Annotated 3-1004. The injured parties are not required to relitigate their demands against the insured in this forum.

Canal urges that this Court must still decide whether the State Court judgments were obtained through bad faith, fraud or collusion. At the outset it must be noted that a Federal District Court does not sit as an appellate tribunal to review State Court judgments. See Hill v.

McClellan, 490 Fed. 2d 859 (Fifth Circuit 1974); Hannah v. Home Insurance Co., 281 Fed. 2d 298 (Fifth Circuit 1960). However, a Federal Court may entertain a collateral attack on a State Court judgment which was obtained by extrinsic or collateral fraud and is void on its face. Diehl v. United States, 438 Fed. 2d 705 (Fifth Circuit) Cert. den., 404 U.S. 830, 92 Sup. Ct. 67, 30 Lawyers Editions 2d 59 (1971); See also United States v. Throckmorton, 98 U.S. 61, 25 Lawyers Edition 93 (1878). Under Section 81A-160(a) of the Georgia Code:

> Any judgment void on its face may be attacked in any court by any person, in all other instances judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

Questions of intrinsic fraud must be raised by a direct attack in the State Courts and must be based upon acts of the adverse party 'unmixed with the negligence or fault of the complainant." Georgia

Code Annotated 81A-160(e). They may not be pursued by a collateral proceeding in the Federal Court.

It is not clear from the pleadings whether the insuror is asserting intrinsic or extrinsic fraud. In any event, a case is presently pending in Polk County Superior Court to set aside the judgments. That forum may address the issues of both intrinsic and extrinsic fraud and clearly has jurisdiction to set aside the judgments. Therefore, this Court must stay the Federal actions pending resolution of the State Court suit to set aside the judgments. While the insurance company claims that it may assert bad faith of the insured as a defense to the contract, that defense is appropriate only where the insured entered into a settlement with the insured parties and is not a defense to a judgment under the terms of the contract, Canal agreed to pay on behalf of the insured "all sums which the insured shall

become legally obligated to pay..." The company also agreed to defend any suit against the insured alleging such injury... even if such suit is groundless, false or fraudulent." (Appendix 57)

It is clear that Judge Henderson's order rejected Canal's contention that the judgments he had ordered it to pay were void for any reason shown by the purported transcript of evidence because he said, (Appendix 61) "The insurance company then made an investigation and deciding that Glover had a valid defense filed defensive pleadings in his behalf in both State suits on August 18, 1973 without requesting or executing a reservation of rights. Canal's insurance policy contained the standard clause in which the company agreed to defend actions against its insured. (Footnote 2) "At the trial of the case for Wesley Hilton's death, the Court asked plaintiff's attorney, "...and this is a suit by the mother in the interest of the child, is that correct?" To which the attorney replied, "Yes, sir, that is correct." Trial

transcript at 2. Under Georgia Law, the children have a cause of action for the wrongful death of a parent only where there is no surviving parent, otherwise a suit for wrongful death is in the surviving spouse.

"On October 24, 1973, three months after the suits were filed and five days before Glover's death, counsel for Canal informed the parties that he was withdrawing from the defense under instructions from the insurance company, which contended that Glover's insurance policy was not in effect at the time of the collision.

"On November 1, 1973, Canal's attorney filed an ex parte motion to withdraw as counsel which was granted on that date by the State Court Judge.

"By letter of November 9, 1973, Glover's personal attorney protested Canal's withdrawal asserting that the insurance was in effect; and on December 26, 1973, Counsel for the Hiltons notified Canal's attorney that the pleadings were still of record and that the case would be called for trial in January of 1974. Canal,

through its attorney, refused to further defend or appear, and on January 7, 1974 the Clerk of Court, Bobby C. Cambron, was duly appointed administrator of Glover's estate and substituted as defendant. No one appeared to represent the defendant. The defensive pleadings were struck and a default judgment was entered in both actions against the Glover Estate, in the amounts of $100,000.00 and $250,000.00."

District Judge Henderson's order and decree, further sustained Cambron's contentions that fault or neglect on Canal's part in suffering the judgments to have been entered against its insured would preclude Canal from setting aside the judgments for fraud under Georgia substantive law. (Appendix 55).

District Judge Henderson in sustaining Cambron's right to recover on the judgments, and in staying the judgment, left only one issue to be determined between Canal and Cambron in the State Superior Court suit and that was Canal's contention of fraud. (Appendix 54-56) The reason Canal was allowed to temporarily leave the Federal Court for

determination of the issue of fraud was pointed out by Judge Henderson (Appendix 56), "At the outset, it must be noted that a Federal District Court is not to sit as an appellate tribunal to review State Court judgments. See Hill v. McClellan, 450 Fed 2d 859 (Fifth Circuit 1974); Hannah v. Home Insurance Co., 281 Fed 2d 298 (Fifth Circuit 1960). However, a Federal Court may entertain a collateral attack on a State Court judgment which was obtained by extrinsic or collateral fraud and is void on its face. Diehl v. United States, 438 Fed 2d 705 (Fifth Circuit) cert. den., 404 U.S. 830, 92 Sup. Ct. 67, 30 Lawyers Ed. 2d 59 (1971); See also United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878). Under Section 81A-160(a) of the Georgia Code:

> Any judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

" Questions of intrinsic fraud must be raised by a direct attack in the state courts and must be based upon acts of the adverse party "unmixed with the negligence or fault of the complainant." Georgia Code Annotated 81A-160(e). They may not be pursued by a collateral proceeding in the Federal Court. "

In the Superior Court case, Cambron raised the defense that all of Canal's grounds for attack on the judgment (other than fraud) had been decided adversely to Canal by Judge Henderson, whose judgment was res judicata, and that Canal had abandoned the grounds of fraud, and therefore, Cambron was entitled to Summary Judgment in his favor.

Depositions in which Canal's claims agent and counsel rejected all claims of fraud were filed in support of Cambron's Motion for Summary Judgment.

Affidavits of Cambron and his counsel and co-defendant Dunaway were filed in support of the Motion for Summary Judgment, as were certified copies of the trial court records in the cases in which Canal was attempting to set aside the judgment for fraud.

Canal also filed a Motion for Summary Judgment in the Superior Court but, it did so only after Cambron's Motion had been argued, it tendered no documents or other evidence in support of its Motion for Summary Judgment, asked for no hearing, and never was heard by the Court.

Canal specified no evidence to be considered by the Court in opposition to Cambron's Motion for Summary Judgment but filed "Canal's certified records" which included a copy of a purported transcript of evidence and proceedings prepared by the Court reporter in the damage suits nine months after final judgments had been entered in the State Court actions. These were the judgments which Canal was now seeking to set aside.

In addition to the defense of res judicata based on the prior Federal Court judgment against Canal and in favor of Cambron, which was sustained by the trial court, it granted Cambron's Motion for Summary Judgment on the ground (referred to in Judge Henderson's order) that Canal was not entitled to relief in equity for fraud because it was shown that Canal could have prevented the return of the

judgments against its insured by the exercise of proper diligence.

The trial court sustained Cambron's defense that Canal, not having been a party to the suits against its insured, could not attack the judgments in those suits for a lack of or excess of jurisdiction.

The trial court sustained Cambron's defense that the judgments attacked by Canal were regular on their face, and that controlling Georgia statutes and decisions required a holding that they were not void even if entered contrary to the manner of practice and procedure allowed by law.

The trial court sustained Cambron's defense that the act establishing the State Court of Polk County, in which the judgments were entered, authorized non-jury trials of all civil cases in which no request for a jury was made by either party, and that such a requirement of demand for jury was not contrary to the Constitution of Georgia nor to statutory provisions affording jury trials in actions ex delicto, and that failure to file a demand constituted a waiver of trial by jury.

The trial court also dismissed the suit as to defendant-appellant Evelyn Hilton, a resident of South Carolina, on her defense raised by motion that she was not subject to jurisdiction of the Georgia Superior Court because she was a resident of the State of South Carolina; and because she had not been properly served in the case; and because she had not been served within the 3 year period of the Statute of Limitations for the bringing of actions in equity to set aside judgments.

It was established by affidavit that Mrs. Hilton was a non-resident of Georgia when the action was filed. The complaint alleged nothing as to Hilton's residence, and showed no basis for the jurisdiction of the court over her in the action; but Canal filed an affidavit showing that Mrs. Hilton had been handed a copy of the complaint and a summons in the case in Anderson County, S.C. on July 19, 1977, by a deputy Sheriff of that county and State.

No showing was made by Canal for resort to personal service beyond the State of Georgia, and no order for such such service was obtained, as required by Georgia statutes.

The record shows that the complaint was filed on the 4th day of January, 1977, one

day prior to the expiration of the 3-year statute of limitations for attacking the judgment which had been obtained by her and which was regular and valid on its face. Hilton's counsel in the suit in which she had obtained the judgment, on March 7, 1977, wrote counsel for Canal & informed Canal that Mrs. Hilton lived at Williamston, S.C.. The evidence failed to show any effort on the part of Canal to locate and serve Mrs. Hilton until July 12, 1977, a period of four months after the filing of the complaint; other than determining whether she had a telephone or street address listed.

In addition to raising the defense of a lack of jurisdiction by motion to dismiss, Mrs. Hilton filed her Motion for Summary Judgment, based on the same defense, among others.

In support of her Motion for Summary Judgment, Mrs. Hilton filed an affidavit which showed that the process served on her was not issued until July 8, 1977, more than 6 months after the expiration of the Statute of Limitations.

The trial court sustained Hilton's motion to dismiss and for summary judgment on the jursidctional ground, and on all other grounds and dismissed the case as to her

Canal Insurance Co. filed its notice of appeal to the Georgia Supreme Court, assigning error on the granting of Cambron's Motion for Summary Judgment and in the overruling of its own Motion for Summary Judgment.

In its Notice of Appeal, Canal set out that no transcript of evidence or proceeding would be filed for transmission to the Supreme Court in connection with the appeal, and none was filed.

Canal had the Clerk of the trial court to prepare a record which included materials filed by Canal, entitled " Canal's Certified Records", These papers were not tended to nor brought to the attention of the trial judge for consideration in his ruling on the defendants' Motions for Summary Judgment, nor on the plaintiff's Motion for Summary Judgment. The purported trial transcripts in the actions sought to be set aside, which were filed with the Clerk by Canal, showed on their face that they were not competent evidence in the form filed, even if they had been tendered, because: (1) They were not made a part of the record of the cases , but were unofficial papers which had been filed long beyond the period of time which under the Georgia law the record remained open, and (2) They were contrary to the 'face

of the record' which showed the rendition of a verdict and entry of a judgment in each case.

Canal failed to have transmitted to the Georgia Supreme Court the depositions of its claims manager, and of the insured's personal counsel, E.L.Gammage, Jr., and of Bobby C. Cambron, and of Marson G. Dunaway, Jr.; and the affidavits of Cambron and Dunaway, all of which evidence were filed in and tendered in support of their Motions for Summary Judgment.

This was the evidence considered by the trial judge as the basis for his rulings on the Motions for Summary Judgment in favor of Cambron and the other defendants ,and this was the evidence which the Georgia Supreme Court has consistently held is necessary in that court before it can or will reverse the judgment of a trial court ; but on the other hand in such cases the judgment of the trial court will be affirmed because appellant has not made it possible for such appellate court to determine whether the trial court was in error or not. App. (90)

Cambron filed his motion in the Supreme Court to require Canal to have transmitted to that Court the affidavits and depositions considered by the trial court and upon which basis the motion for Summary Judgment in favor of Cambron had been granted.

Canal opposed the motion and Cambron then dismissed the motion, since the Georgia appellate courts had consistently ruled that failure of the appellant to present in the appellate court the entire evidence on which the trial court had based its ruling sustaining a motion for summary judgment was fatal to appellant and the judgment would be affirmed.

The Georgia Supreme Court ignored the well-settled principle of law that a judgment of a court having jurisdiction of the parties and the subject matter can be attacked only for defects showing it to be void on its face; and the equally well settled principle of law that only a party to a judgment can attack it for a lack of or an excess of jurisdiction. App. (107-109)

As authority for its threshold holding that " there is no requirement that to attack (the judgments), Canal show the judgment to be void on its face. " (App. 3) the Supreme Court cited the case of Henry

Co. v. Johnson, 178 Ga 541. A cursory or careful reading of that case will show that there is nothing said therein to support such a ruling; and the facts set out in that case show that the judgment involved was void on its face because the record showed that there had been no service or waiver of process by the defendant. The cases cited in Henry Co. v. Johnson were also cases in which, as a factual matter, the judgments were shown to be void on the face of the record.

The Georgia Supreme Court mis-construed the basis for the trial court's judgment that Canal could not attack the judgments for fraud, saying that "Defendants contend that Canal may not bring such an attack (for fraud) because it was not a party to the judgment." See App (3). As a matter of fact, the trial court held, consistently with the appellate court decisions, that one not a party to a judgment can not attack it on a jurisdictional ground; and that in this case Canal could not attack the judgments for fraud in equity because it could have prevented the return of such judgments by the exercise of proper dil-

igence. In the body of the decision, the Georgia Supreme Court set out that " Canal began defense of the suits... but later decided the relevant policy had been cancelled....Canal withdrew from the defense." It was on this very basis that U.S. District Court Judge Henderson had already entered a Summary Judgment in favor of Cambron; and it was on this very basis that the trial court had held that Canal could not now attack the judgments for fraud; and it was on this very basis that the case cited by the Georgia Supreme Court as authority for its decision in this case held in the third headnote: (App. 111) " As a general rule, equity will grant no relief to one against whom an unfavorable judgment has been rendered, even in consequence of fraud, where the aggrieved party could have prevented the return of such a judgment by the exercise of proper diligence..." Lewis v. Lewis, 228 Ga 703.

In the second division of its decision in this case, the Georgia Supreme Court said (App. 6) "...fraud does not have to be pleaded with particularity to withstand a motion to dismiss." and

" What has been written is sufficient to show that Canal is entitled to its day in court seeking to prove the allegations (of fraud) of its complaint."

The Georgia Supreme Court would not recognize that the issue was not what was sufficient in pleadings to withstand a motion to dismiss, but that the trial court had considered the matter of Canal's allegations of fraud on motion for Summary Judgment from an evidentiary standpoint, and had found as a matter of fact that Canal had not and could not come forward with any evidence to support its allegations of fraud; and Canal had already had its "day in court" to prove the allegations of fraud and had failed. This decision of the Georgia Supreme Court gives Canal not "one day in court", but a third day after having lost the first two in the U.S. District Court and the Georgia trial court. The Georgia Supreme Court further held in the second division of its opinion (App. 6) that " Defendants in their motion for Summary Judgment failed to show that they are entitled to judgment as a matter of law & that there were no material fact issues

remaining for decision." But that Court did not and could not have known what defendants showed, or failed to show in the motion for summary judgment because it did not have the evidence before it that was considered by the trial court in entering summary judgment in favor of defendants.

In its third division of the decision entered in this case, the Georgia Supreme Court pointed out (App. 8) that a judgment void for a lack of jurisdiction has long been held subject to attack by "anyone whose rights are affected thereby"; but ignored the equally well established principle that this can be done only when the lack of jurisdiction is apparent on the face of the record; and the other controlling principle stated in Thomas v. Lambert, 186 Ga 616 @ 617, that " a third person not a party to the record can not go into a court and move to set aside a judgment which is not against him."

The Georgia Supreme Court in this case said (App. 9) " Anything contrary (to the holding that Canal may bring the attack) in Thomas v. Lambert is overruled." But it is significant we believe to note that nothing in the

Thomas v. Lambert decision was actually overruled because it is good law and law that will be followed in the future but the Georgia Supreme Court chose to suspend its operation in order to come to the result it desired to reach in this case.

After having reversed the course of Georgia decisions and statutes in order to find that Canal was entitled to make the attack for fraud, even though the record showed it could have avoided the rendition of the verdicts and judgments by the exercise of proper care ; and it was entitled to make the attack on jurisdictional grounds even though it was not a party to the previous actions in which the judgments were rendered; the Georgia Supreme Court continued to ignore precedents and statutes invoked in other cases between other parties & without overruling the prior decisions, determined that a provision of a statute requiring the trial of all actions in the court rendering the subject judg--ments without a jury in the absence of a jury demand was contrary to a provision of the civil practice act which requires a jury trial in actions ex delicto generally. (App. 10)

In the final portion of division 3 of its decision, the Georgia Supreme Court acted contrary to prior ruling precedents and to statute in holding that a litigant in the State Court of Polk County does not waive a trial by jury when it fails to ask for one, as is required by that court's enabling statute.

The Georgia Supreme Court summarily disposed of the trial court's ruling in favor of Cambron that the U.S. District Judge's judgment was res judicata of all issues in this case other than the question of fraud by saying, (App. 11) " It is plain from our reading of the orders (in the Federal Court case) that no issues discussed herein may reasonably be said to be res judicata."

Cambron submits, on the other hand that it is plain from reading these orders that the U.S. District Judge left only the issue of fraud to be litigated in the Georgia court system and left that to be so litigated only because the Federal Court had no jurisdiction to determine issues of intrinsic fraud.

Cambron shows that the Georgia Supreme Court deprived him of his property rights gained in U.S. District Court

and that it, like the Georgia trial court, was restricted to determining in this case only the issue of fraud which had been released to it by the Federal court.

As to defendant-appellant Hilton, the Georgia Supreme Court construed Ga. Code Ann. 81A-104(e)(2) as authority for making personal service on Hilton outside the State of Georgia because the action was construed to be one in rem, or quasi in rem , affecting property rights flowing from a judgment, and reversed the trial court's dismissal as to her.

This construction of that code section and of the nature of the action was in violation of Hilton's Federal Constitutional rights to due process of law and equal protection of the'law as was determined and set out by this Court in the recent important case of:

SHAFFER V. HEITNER, 97 S. Ct. 2569
53 L. Ed. 2d 683 (1977)

In its decision in this case, the Georgia Supreme Court said App. (12) "Our conclusion that an action to set aside a judgment is an action in rem or quasi in rem follows from the nature of a judgment as property within the state. A right to

recover at law is a chose in action... A chose in action is personalty. "... where the subject of the suit relates to an actionable interest or claim by the plaintiff in real or personal property located in this state, a court of equity has jurisdiction to render a decree in rem with respect to the particular property involved, so as to exclude the adverse interest of a non-resident who has been made a party...and...served by publication..." Blount v. Metropolitan Life Ins. Co., 190 Ga 301, 303,(9 SE2d 65) (1939).

" Our analysis appears to accord with the majority view in the United States; ' Most courts regard such judgment as a res within the state, and the proceeding to set it aside as a proceeding in rem, and uphold the judgment setting aside or vacating the previous judgment, although no personal service within the state is made upon the defendand and although the service upon him was by publication or personally beyond the jurisdiction of the court.' Annot., Process, Action to Set Aside Judgment, 163 ALR 504, 504 (1946). On our facts, of course, Mrs. Hilton was personally served outside the state."

On the other hand, this Court in Shaffer v. Heitner stated that in cases such as it, and the present case where "the only role of the property is to provide the basis for bringing the defendant into court.... if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible "

This court has, therefore, laid to rest the assumption that a state could exercise judicial authority over 'things' without at the same time exercising judicial authority over persons. This is a fallacious assumption. In all civil cases it is the defendant's interest in something which is at stake, whether it be his bank account or his use of some 'thing'. The defendant is affected in the same manner, although possibly not to the same extent, whether jurisdiction is in personam or quasi in rem. Therefore, it seems only just, as held by this court, that the jurisdictional test should be the same for both types of jurisdiction.

In spite of the clear rule that the Georgia Supreme Court is one for the correction of errors of law, and not for the trial or retrial of issues of fact, that court

here re-tried the issue of fact and found that Canal had been diligent in having service of the suit perfected and that such service as a matter of law did relate back to the date of filing of the action. App. (14)

The Georgia Supreme Court, on January 19, 1978, reversed the trial court's entry of judgment in Cambron's favor, held that Canal is entitled to a jury trial as to the issue of fraud; and held further that even if Canal fails to establish fraud, nevertheless, Cambron and the other defendants are required to re-litigate the issue of damages in the State Court of Polk County before a jury. App. (6).

The Georgia Supreme Court also reversed the trial court's dismissal of the action as to Hilton because it was not brought against her within the period of the Statute of Limitations.

Cambron and other defendants, greatly surprised at the Georgia Supreme Court's failure to either follow or overrule clear precedents and failure to follow the clear mandate of applicable statutes , filed their motions for re-hearing which were based on the deprivat-

ation and violation of their federal Constitutional rights to due process of law and equal protection of the laws which had occurred as a result of the decision and judgment of the Georgia Supreme Court of January 19, 1978. App. (16)

The motion for re-hearing was considered by the Georgia Supreme Court, and Cambron's contentions were rejected as set out in his motion for re-hearing by entry of an order of denial on February 8, 1978. App. (42).

This appeal is taken pursuant to 28 U.S.C. 1257 (2), providing for an appeal from the decision of the highest Court of a State to the U.S. Supreme Court where substantial Federal questions were decided adversely to the contentions of the party appealing by the State Court.

The judgment sought to be reviewed was dated February 8, 1978, and entered the same date and overruled the motion for a rehearing as to the decision of said Supreme Court of Georgia entered on January 19, 1978. App. (42).

The statute believed to confer on this court jurisdiction in such cases is

28 U.S. Code Sect. 1257 (2)

Cases sustaining jurisdiction in cases such as the present one are:

Jas. Stewart Co v Sadrakula 60 S Ct 431

Shaffer v. Heitner, 97 S Ct 2569

Silas Mason Co v. Tax Com. 8 S Ct 233

in which cases it was held that the Supreme Court has jurisdiction on appeal where the decision of the state court sustaining a state law involves a question as to the jurisdiction and control of the United States or its courts.

The present case involves the supremacy of a decision of the U.S. District Court made on the cause of action involved in this case as compared to a contrary decision of the State Supreme Court on the same issues.

The present case involves, in addition the constitutionality of state statutes , as applied to appellant Cambron by the Georgia Supreme Court in its decision and judgment attacked here as being a denial of due process and equal protection of the laws under the Federal Constitution.

The raising of the Federal Constitutional questions were timely, since they first arose from the State Supreme Court unanticipated act in giving to the statutes new constructions which deprive the appellants of rights under the Federal Constitution; and the State Supreme

Court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.

GREAT NORTHERN RAILROAD CO. VS. SUNBURST OIL & REF. CO., 53 S CT 145

RADIO STATION WOW V. JOHNSON, 65 S CT 638

And the challenge is that these statutes are adjudged to mean one thing in this case and another thing for others.

GREAT NORTHERN R. CO. VS. SUNBURST, 53 S CT 145 @ 149

The statutes involved in this appeal are:

Ga Laws, 1901, p. 156 & 159
Ga. Code Ann. Sec. 6-805
Ga. Code Ann. Sect. 81A-155
Ga. Code Ann. Sect. 81A-160 (a)-(e)
Ga. Code Ann. Sect. 81A-156(c)
Ga. Code Ann. Sect. 110-709
Ga. Code Ann. Sect. 37-219
Ga. Code Ann. Sect. 81A-160(f)
Ga. Code Ann. Sect. 81A-182
Ga. Code Ann. Sect. 81A-104(e) 2
Ga. Code Ann. Sect. 81A-160(f)

Since these laws are not attacked as unconstitutional per se, but only as applied to appellants by the Georgia Supreme Court, the foregoing statutes are not appended hereto, and extracts

from key decisions of the Georgia Supreme Court illustrating how the statutes have been applied to these appellants in this case so as to deprive them of their property without due process of law and equal protection of these laws are appended. (App. 90- 127).

QUESTIONS PRESENTED

1. Did the Georgia Supreme Court not deprive Cambron of his property and equal protection of the laws when it upset the judgment of the trial court and the U.S. District Court Judge on all issues, except the issue of fraud which had been released to the State Court's jurisdiction by the Federal Court?

2. Did the Georgia Supreme Court not deprive Cambron of his property and equal protection of the laws by failing to follow statutes and judicial precedents establishing procedural due process for persons appealing the granting and denial of Summary Judgment motions under the Georgia practice?

3. Did the Georgia Supreme Court not deprive Cambron of property and equal protection of the laws as a matter of procedure, and substantively, when it not only held the trial court in error in granting summary judgment, but without even having

before it the evidence upon which the trial court based its judgment; retried the case and made a final decision that would be binding on the trial court, that the judgments of the State Court of Polk County were void.

4. Did the Georgia Supreme Court not commit error which deprived Cambron of property and equal protection of the laws without due process when it interpreted the provision of the statute creating the State Court of Polk County and authorizing trials non-jury in the absence of jury demand as being contrary to the jury trial mandate of the Civil Practice Act; while it not only did not over-rule, but cited in support of its said decision the case of MARLER V. C & S. BANK in which it held that a similar provision of the Cobb State Court act was not in conflict with the Civil Practice Act mandate for jury trial and in which ruling precedents were followed which hold that failure to demand a jury trial is a waiver thereof?

5. Did the Georgia Supreme Court deprive defendants of their property without due process and equal protection of laws when it interpreted the Civil Practice Act provision for jury trial in cases ex delicto as limiting the jurisdiction of the State Court of Polk County in

spite of the specific provision of the Civil Practice Act which states that it shall not be construed as extending or limiting the jurisdiction of the courts or the venue of actions therein?

6. Did the Georgia Supreme Court not deprive appellant Hilton of her property without due process of law as previously established by this court in such cases in SHEFFIELD V. HEITNER, by implementing the Georgia statutes authorizing service on non-residents out of the state so as to give the Georgia courts quasi in rem jurisdiction to set aside a judgment obtained by her for $100,000 at a time when she was a resident of South Carolina?

STATEMENT OF THE CASE

(a) The Federal questions involved in this appeal were raised in the following manner and at the times indicated:

Cambron and other appellants were defendants in the trial court in an action by Canal Insurance Company filed to set aside judgments obtained by some of the appellants against Cambron in the State Court of Polk County, Ga. in January, 1974, on the grounds of fraud.

Canal amended the complaint by adding contentions that the judgments were void n not only because of fraud (which was pleaded only in general,conclusionary form), but because the judgments had been directed by the court and the amounts not independently established by a jury.

Defendants in the trial court had already secured Summary Judgment against Canal in the U.S. District Court as to all issues involved in their claim against Canal, except the issue of fraud; the District Court in its order having stayed the execution of the judgments in favor of defendants for Canal to attempt to set aside the judgments in the State Court for fraud, be-

cause the District Court did not have jurisdiction to consider "intrinsic" fraud, and it not appearing what type fraud Canal was alleging.

Defendants-appellants filed their motions to dismiss on grounds that:

(a) Canal could not attack the judgments for fraud because it had suffered the judgments to be entered against its insured when it could have prevented the entry of the judgments by proper care

(b) The judgments were not void on their face nor on the face of the record and could only be attacked for a lack of jurisdiction in the court; and such attack could be made only by parties to the record.

(c) The judgment of the U.S. District Court was res judicata as to all issues except the issue of fraud.

(d) The judgment against defendant Hilton could not be attacked in this suit for the reason that she had not been served with process within the period of limitations provided by law; and Canal did not show diligence in procuring service so that it would relate back to the time of filing the complaint.

(e) The State Court of Polk County had jurisdiction to try the cases without a jury, since no jury had been demanded.

Defendants filed their Motions for Summary Judgment, and tendered therewith evidence in support thereof, in the form of affidavits and depositions.

The Motions for Summary Judgment and to Dismiss were heard simultaneously, & after the hearing, Canal filed its Motion for Summary Judgment, but did not file any evidence or stipulate any evidence for consideration by the court with reference to its purported Motion for Summary Judgment, did not serve the Motion on defendants as provided by law, and no hearing was ever held by the Court on said Motion.

The trial court entered its judgment in which it sustained defendants' contentions made in their motions to dismiss and in their motions for Summary Judgment, and entered Judgment for defendants, on their motions, and denied Canal's motions.

Canal appealed to the Georgia Supreme Court, and that Court reversed all of the trial court's findings and judgment; did not require Canal to bring to that Court a transcript of evidence before the trial court on Motion for Summary Judgment, but entered its decision that the judgments attacked by Canal were void as to the amounts,and that Canal was entitled to a trial of its contentions of fraud.

Within the time allowed by law, defend-

ants-appellants filed their motion for rehearing in the Georgia Supreme Court, in which they enumerated the ways in which they contended they had been deprived of their property without due process of law and of equal protection of the laws by that court's implementation of certain statutes and decisions which were unconstitutional when implemented as to defendants in a manner different from and contrary to the rules and decisions when applied to other persons and in other cases.

The Georgia Supreme Court considered the motion for rehearing, rejected all of defendants' contentions made therein, and denied a rehearing.

Appellants show that they raised the Federal questions as soon as the State Court procedures and decisions brought about a violation of their rights as citizens under the U.S. Constitution & as soon as they could have been raised in this case.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The Federal questions raised in the motion for rehearing, we submit, are substantial and of the essence of the decision of the Supreme Court of Georgia which rejected the motion; and the judg-

ment over-ruling the motion and reversing the trial court could not have been made except by the action taken by the Georgia Supreme Court in implementing state statutes, decisions and procedures as to these appellants in a manner different from that intended by Georgia statutes and different from that implemented as to other persons and cases similarly situated. For illustrations of how these Federal questions were urged on the Georgia Supreme Court, see App. (34)

" These appellees are having different and inapplicable principles of law applied to them than are applied generally by this court. Appellees further contend that they are not being afforded equal protection of the foregoing principles of law as other citizens have been and are being afforded. Such deprivatior and treatment, we contend, is contrary to appellees' rights as citizens of the United States under the Fifth and Fourteenth Amendments to the Constitution of the United States."

See further (App. 35) " We respectfully submit that the ruling of this court. ....deprives these appellees of their rights to property as adjudicated and established by the judgment of the United States District Court, Northern District of Georgia,

and thus is contrary to and a violation of the Fifth Amendment to the Constitution of the United States in that they are deprived of their property without due process of law and are deprived of equal protection of the laws; and that this court has no jurisdiction to hear and determine any issue in this case other than the issue of bad faith, fraud or collusion because all other issues concerning liability of Canal to these appellees were adjudicated by the U.S. District Court except those questions of fraud which were released by said District Court for trial in the present state court action."

And see App. (40) " We submit that to construe the CPA provisions relating to jury trial as preventing the State Court of Polk County from trying a civil case in the absence of a demand for jury is definitely and positively limiting the jurisdiction of that court contrary to the clear prohibition of such construction in the act itself.

" Such a construction has deprived appellees of their property rights as citizens of the United States under the Fifth and the Fourteenth Amendments to the Constitution of the United States in that it is not only a failure of due process of law, but contrary to the provision of the stat-

ute being construed, and it denies to appellees the equal protection of the laws."

As we understand the rights of a citizen under the Federal Constitution, they include the right to enjoy the benefits of an adjudication obtained by them in a Federal court, without being later deprived of such benefits by a State Court; they include the right to pursue the procedures as established by law for the resolution of their legal claims against others and have the laws controlling these procedures and remedies interpreted and implemented in their favor and in the same manner as they are interpreted and implemented in other proceedings with reference to other persons, as well as having such laws interpreted and implemented against them and in like manner; they include the right to have the courts require those who oppose them to follow the same principles when carrying appeals to the highest court of the State as are required of other litigants in the same situation; & they include the right to have state courts enforce statutory provisions that would clearly preclude the entry of a judgment against them.

All of these rights are involved in the

Federal questions raised in this case and the proper resolution of these Federal questions wouldbe determinative of the Georgia Supreme Court's ruling on Cambron's Motion for Rehearing and it cannot be said to be based on adequate non-federal reasons when it could not stand on any ground if the Federal questions are resolved properly.

WHEREFORE, appellants have shown, we submit, that the questions presented here are of a substantial nature, and the resolution of these questions involving Federal constitutional grounds,should require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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